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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 370

MAE POSS, PETITIONER

v.

ABRAHAM RIBICOFF, Secretary of Health, Education and Welfare

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (Pet. App. 18) is reported at 187 F. Supp. 824. The opinion of the Court of Appeals for the Second Circuit (Pet. App. 23) is reported at 289 F. 2d 10. The opinion of the Court of Appeals on petition for rehearing (Pet. App. 25) is reported at 289 F. 2d 11.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1961, and a petition for rehearing was denied on May 1, 1961. On July 21, 1961, by order of Mr. Justice Frankfurter, the time for filing a petition for a writ of certiorari was extended to September 1, 1961. The petition was filed on August 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in acting upon an application for social security benefits, the Secretary of Health, Education and Welfare may look behind the employer's characterization of payments made to the employee as "wages" and determine that, in fact, these payments did not constitute bona fide compensation for services rendered to the employer.

STATEMENT

In this action petitioner seeks to overturn the decision of the Secretary of Health, Education and Welfare that she was not entitled to the maximum social security benefits she claimed as she was never paid "wages" in excess of $600 per year during the years in question. Both courts below held that the Secretary was entitled to inquire into whether the payments made to petitioner constituted, in fact, as well as in name, "wages" (*i.e.*, compensation for services rendered to the employer), and that the decision of the Secretary in this regard was supported by sub-

stantial evidence. The basic facts, no longer in dispute,[1] may be summarized as follows.

Petitioner filed an application for old-age insurance benefits on July 1, 1957, which was disallowed by the Bureau of Old Age and Survivors Insurance on the ground that she had not established that she was a "fully insured individual" under Section 202(a) of the Act, 42 U.S.C. 402(a). On May 11 and July 17, 1959, at petitioner's request, hearings were held before a referee of the Social Security Administration to review this determination.

It developed at the hearings that petitioner performed various secretarial and clerical services for two family corporations by the names of Howard Funding Company, Inc., and Alsam Holding Company, Inc., each of which has owned an apartment building for many years. Jacob Poss, the husband of petitioner, owned 50% of the stock of Alsam and his brother Samuel owned the other 50%. In Howard Funding, Jacob owned $\frac{1}{3}$ of the stock, his brother Samuel $\frac{1}{3}$, and the remaining $\frac{1}{3}$ was owned by H. D. Pasachoff, a nephew of the two brothers.

Petitioner worked for the corporation for more than twenty years before 1953 without compensation. In 1953, at her request, it was agreed that she would be paid $50 a month or $600 per year for her services to Alsam. Howard Funding did not agree to make any payments to her for her secretarial work until,

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[1] Petitioner no longer challenges, and therefore apparently concedes, the correctness of the district court's finding that the determination of the Secretary was supported by substantial evidence.

allegedly, 1956. Alsam continued these payments through the first part of 1957.

Petitioner's husband, Jacob, served as legal counsel and as secretary of the two corporations until June 1956. Then, petitioner was supposedly informed that she would be secretary of the corporations effective July 1, 1956, in place of her husband, and would receive a salary of $4200 a year from the two corporations. Alsam and Howard Funding were each to pay her $2100, which amount included $600 annually for typing, stenographic, and clerical services performed. On June 30, 1957, petitioner gave up her alleged post as secretary of Alsam and Howard Funding.

On June 30, 1959, the referee, after a consideration of petitioner's entire case *de novo*, rendered his decision reversing in part the ruling of the Bureau of Old Age and Survivors Insurance. He held that petitioner was fully insured under the Social Security Act by reason of wage payments of $600 per year being made to her by Alsam in the years 1953 through June 1957 for her clerical, typing and stenographic services, performed for the Alsam corporation.

The referee further found petitioner's election as secretary of Alsam and or Howard in 1956 illusory and a sham and that any remuneration reported by them for her in the years 1956 and 1957, other than for clerical and typing services for Alsam, was in fact wages paid to her husband, Jacob M. Poss, who, the referee held, actually continued as secretary.

This finding was abundantly supported by the evidence.[2]

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[2] The District Court provided the following summary of the evidence before the referee (Pet. App. 21-22):

> * * * The Referee in analyzing the proof had to contend with the fact that for 1956 and 1957 *none of* the checks issued by Howard was produced. As to plaintiff's failure to produce these checks, suffice it to say that the Referee as trier of the facts placed no credence in the affidavit submitted to him explaining plaintiff's failure to produce these checks, and of six checks issued by Alsam in 1956 totaling $2,150, one check for $1,000 bore the notation "Repayment of Loan" (Ex. 32). The 1956 tax returns (Exs. 39 and 40) of both corporations, under Schedule "D", "Compensation of Officers," does not list plaintiff as secretary or any other officer of either corporation. These exhibits coupled with other factors are indicative of the fact that plaintiff's alleged appointment as secretary of both corporations was merely a paper transaction to permit both plaintiff and her husband to collect social security benefits.
>
> Other factors are:
>
> 1. She did not know if there had ever been any official meeting of the directors or officers and that if there was she never attended one (Tr. 96).
> 2. She did not know whether she was a director or not (Tr. 96).
> 3. She was under the supervision of her husband, Jacob Poss, Alex Poss and an accountant *before* becoming Secretary and yet continued to work under their supervision *after* becoming Secretary even though her husband, Jacob Poss, had then theoretically resigned as Secretary (Tr. 81, 163).
> 4. She continued to do the typing and clerical work after she became Secretary that she did before she was Secretary (Tr. 161).
> 5. She did not increase her services on becoming Secretary but rather, as Secretary, she became responsible for any accidents which would take place in the build-

On July 16, 1959, petitioner requested a review by the Appeals Council of the referee's finding that she had received only $600 in wages in 1956 and $300 in 1957. Petitioner claimed that she was entitled to be credited with $4200 in 1956 and $2250 in 1957. The Appeals Council denied the request for review on October 16, 1959.

The district court held that the Secretary had not exceeded his power and that his decision was supported by substantial evidence. On appeal, the Court of Appeals for the Second Circuit affirmed. The court noted, *inter alia*, that it was " * * * necessary for the Secretary or his delegate to determine what part of the payments nominally made to the appellant were paid as 'wages.' " (Pet. App. 25; 289 F. 2d at 11).

ARGUMENT

Petitioner challenges the authority of the Secretary of Health, Education and Welfare, in determining the amount of benefits due her under the Social Security Act, to find that sums of money purportedly paid to her by her employer were not actually paid

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ings by reason of her position as an officer. She believed that her job as Secretary made her personally liable for injuries of the tenants on the property (Tr. 89).

6. She did not know whether she was a stockholder in the corporations (Tr. 76, 78).

7. She did not know the number of stores or apartments in the two buildings owned by the corporations (Tr. 78).

8. She did not recognize the names of Colon Harris and Booker Harris, the two building superintendents employed by the corporations (Tr. 139).

to her as wages. We submit that the court below was manifestly correct in holding that the Secretary had this authority. Moreover, there is no conflict of decisions. Further review by this Court is therefore not warranted.

The money benefits claimed by petitioner under Section 202(a) of the AAct, 42 U.S.C. 402(a), are computed under Section 215(a), 42 U.S.C. 415(a), under various formulae each of which is dependent on "wages". It is well settled that the Secretary may disallow purported wwages paid to a claimant, on the ground that there waas no bona fide employment relationship existing betwween the recipient and the payer of the putative salaary. See, *e.g.*, *United States* v. *Lalone*, 152 F. 2d 43 (C.A. 9); *McGrew* v. *Hobby*, 129 F. Supp. 627 (D. Kans.); *Thurston* v. *Hobby*, 133 F. Supp. 205 (W.D. Mo.); *Murray* v. *Folsom*, 147 F. Supp. 298 (D. D.C.). *A fortiori*, the Secretary was entitled to examine tthe circumstances surrounding the purported paymentts to petitioner to determine whether they were actuallly paid as remuneration or whether they were merelyy bookkeeping entries motivated by the coverage rrequirements of the Social Security Act.

The view of the court below is in accord with that of the Ninth Circuit in *Flemming* v. *Lindgren*, 275 F. 2d 596. There, a chicken farmer incorporated his business and paid himself wages in excess of the earnings of the corporation. The Court of Appeals, while determining that thee Secretary should not have arbitrarily limited the amount of wages to the earnings of the corporation, expressly held that it was

within the Secretary's power to determine what portion of payments to a claimant actually constitute "wages" and that he "* * * should reconstruct a reasonable wage under all of the circumstances." 275 F. 2d at 597 (see also *Gancher* v. *Hobby*, 145 F. Supp. 461 (D. Conn.)).

Petitioner's reliance on *Social Security Board* v. *Nierotko*, 327 U.S. 358, is misplaced. That case involved a determination of whether "back pay awards" ordered by the National Labor Relations Board were "wages" under the Social Security Act and the question before the Court was whether this type of compensation to an employee came within the statutory definition. Here, the question decided adversely to petitioner was whether any of the sums in question were compensation to her at all, or whether they were, rather, compensation to her husband.

Similarly, there is no merit in petitioner's assertion of a conflict with the holding in such cases as *Rhoads* v. *Folsom*, 252 F. 2d 377 (C.A. 7); *Goldman* v. *Folsom*, 246 F. 2d 776 (C.A. 3); and *Flemming* v. *Lindgren*, *supra* (Pet. 5-7, 15-16), that the motive of an employer in hiring an employee is irrelevant to a determination of whether the employee is entitled to benefits under the Act, even if the motive is to qualify the employee for social security benefits. Neither the Secretary nor the courts below suggested that the motive underlying the employment of petitioner was a relevant consideration. Rather, the basis of the administrative action, and its affirmance by the courts below, was that a part of the purported

remuneration to petitioner did not, in actuality, constitute compensation for services rendered by her to the employer, but represented compensation to her husband for his services.

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961